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IN THE

Supreme Court of the United States

October Term, 1962.

No. 831.

GENERAL ELECTRIC COMPANY
and
HENRY W. SAWYER, III,
Petitioners,

v.

HONORABLE WILLIAM H. KIRKPATRICK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTION PRESENTED.

1. Did the Court of Appeals err, in refusing to review by the extraordinary writs of mandamus and prohibition, an interlocutory discovery order of the district court requiring petitioner, General Electric Co., to answer Interrogatories by describing in detail, with all of the information in its possession, acts of its employees which violated the antitrust laws, where G. E. had used the information as a basis for disciplining the employees and had publicly admitted the violations in a widely disseminated proxy statement?

STATEMENT OF THE CASE.

These are treble damage actions by municipalities and public utilities arising out of the price fixing conspiracies to which petitioner, General Electric Co. (G. E.), pleaded guilty in criminal actions brought by the United States.

On October 27, 1961 plaintiffs served interrogatories on G. E. based on statements made in a G. E. proxy statement, publicly issued on March 17, 1961. The relevant portion of the proxy statement is as follows:

> "In the light of these efforts to secure understanding and compliance with the Policy it was a shock to discover that certain officers and employees in three of the Company's twenty-one operating divisions had violated the Policy and, in some cases, the antitrust laws. The small group of officers and employees involved had escaped earlier detection through their efforts to keep their activities secret (some of them used code names, wrote anonymous letters, used public phone booths rather than office or home telephones, held meetings at out-of-the-way hotels and motels, etc.).
>
> "As soon as the Policy violations were first discovered, the Company made its own extensive investigation. . . .
>
> "It was also decided that discipline would not, at that time, be imposed for violations of the Policy which occurred in 1956 and earlier, based on the principle that employees should not forever be in jeopardy of discipline for stale offenses. All those who admitted to the Company in the course of its investigation that they had violated the Policy after 1956 were substantially reduced in rank and salary and were demoted to positions having no pricing responsibility. . . ."

The policy referred to is a company policy against discussions with competitors relating to prices, etc.

Plaintiffs' interrogatories directed to this proxy statement asked in substance who met where, when, and with what competitors, and what the agreements and antitrust violations were. When G. E. first purported to answer the interrogatories on December 1, 1961, no such information was given. It was stated that the only person having any information with respect to the matters inquired about was Lawrence I. Wood, a vice president and secretary of the company, who was also general counsel.

These answers were held by the district court to be inadequate and a memorandum order was filed February 16, 1962 requiring further answers under F. R. C. P. 37. The court stated:

> "The defendant admits that its vice president and general counsel had knowledge of the facts which impelled it to issue the statement and is able to answer the questions in full. Obviously, if the corporation in issuing the proxy statement were willing, as it was, to act upon the knowledge of an executive officer, that knowledge must now be availed of by it and the questions must be answered."

Further answers were filed on March 12, 1962, disclosing that not only Mr. Wood but also members of the board of directors knew facts concerning the matters inquired about. Indeed, Mr. Cordiner, chief executive officer of G. E., stated in a public speech on January 5, 1960, regarding the price discussions by G. E.'s employees with their competitors:

> "I, of course, felt obligated to report this unfortunate situation to the board of directors and I did so. As you know from my position guide issued by the board of directors, it is peculiarly and exclusively the responsibility of the chairman of the board, as the chief executive officer, to evaluate the acts of these employees and the damage to the General Electric Co. resulting from such acts. I must also determine what action

should be taken, in channels, pertaining to such individuals, who—as some explained it—had 'taken a calculated risk' and had been apprehended as a result of these acts. It has always been my philosophy not to act hastily, and never in anger. Thus I had many conferences with members of the executive office. After listening to and considering most carefully the advice of these senior officers, I came to the only possible conclusion: that the company could not ignore such flagrant disregard of the company directive policy 20.5." Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United State Senate, Eighty-seventh Congress, First Session, Part 27, Exhibit 11, p. 17116.

Of course, the employees of the company themselves, who had been involved in the price fixing meetings, also knew the facts, but again, even as to such employees still with the company, no information was supplied in answer to plaintiffs' interrogatories as to what competitors were at the meetings with such employees, where or when particular meetings took place or what agreements were reached. Accordingly the district court then entered the third order, as to which review is now sought, directing G. E. to supply that information.

In partial compliance with this order, G. E. interviewed those of its present employees known to have engaged in price discussions with competitors and as a result of those interviews, disclosed the names of competitors with whom those employees had met and specific price agreements they had made with their competitors.

On a claim of privilege, G. E. did not disclose in its answers to the proxy statement interrogatories the information obtained from its former employees, while they were still in the company's employ and while the company was conducting the investigation the results of which are referred to and made public in its proxy statement. These

employees were interviewed by house counsel of the company and sometimes by outside counsel. In all instances their interests and the interests of G. E. were in conflict, since the purpose of the investigation was to determine violations of company policy and to discipline the employees who had violated the policy. Forty-eight employees were disciplined, and subsequently the employees who were convicted and sentenced in the criminal cases were forced to resign.

G. E.'s interviews with its former employees were recorded in memoranda or statements, some of which were submitted to the employees for signature or initialling. For example, four of the five statements obtained from C. E. Burke, a former G. E. employee who pleaded guilty to the circuit breaker indictment, were signed or initialled by him, attesting their accuracy. Thus the assertion at page 5 of petitioners' statement of the case that "the contents of the memoranda have been disclosed only to counsel" is false, and is based on an erroneous statement in one of the many affidavits of one of its house counsel, Howard Aibel, which was submitted by G. E. in the Court of Appeals in support of its mandamus petition.

The order of the district court does not require production of the actual statements.[1] It simply requires G. E. to answer admittedly relevant interrogatories with all the facts in its possession regarding antitrust violations publicly acknowledged in its proxy statement. It encompasses information obtained by G. E. from its former employees, as to which the district court rejected G. E.'s claim of privi-

1. In a separate order not before this Court four of the five Burke statements were ordered produced, upon a finding by the district court that good cause had been shown for their production, based in part on Burke's testimony in depositions that ". . . I have done my best to wipe this whole thing away from my mind, because that, to me, has been illness, that preying on my mind, and I have done a pretty good job, and I am not going to wrack my brain bringing those memories back again today, ...", and on his contradictory testimony.

lege, based on findings that the interests of those employees and G. E. were antagonistic since each such employee "was definitely advised by the (G. E.) lawyer that, although his disclosures were 'privileged', if it should turn out that they revealed a violation of written company policy directives, the lawyer would 'report that fact to management,'" and that such employees were not "in a position to control or even to take a substantial part in a decision about any action which the corporation" might take upon the advice of the attorneys interviewing them for the company (Opinion of District Court, Appendix A to Petition, at pages 20 and 22). In other words such employees were no different from ordinary witnesses with knowledge of the facts.

Petitioners applied for writs of mandamus and prohibition in the Court of Appeals, to vacate the district court's Rule 37 order requiring G. E. to answer plaintiffs' interrogatories, and the application was denied. Chief Judge Biggs dissented, not from the court's refusal to issue the writs, but only from its refusal to issue a rule to show cause why the writs should not be issued. Rehearing was refused by six judges of the court en banc, Chief Judge Biggs again dissenting on the same ground. In the Court of Appeals, petitioners for the first time raised the question of work-product under the doctrine of *Hickman v. Taylor*, 329 U. S. 495, having relied exclusively in the district court on the assertion of attorney-client privilege.

ARGUMENT.

Without alleging any abuse of discretion by the Court of Appeals, petitioners seek reversal of that Court's refusal to review by the extraordinary writs of mandamus and prohibition a routine discovery order of the district court. As pointed out in *Roche v. Evaporated Milk Association*, 319 U. S. 21, 26:

> ". . . The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

Neither of those requirements is present here, and piecemeal review of a similar interlocutory discovery order was held to be improper by this court in *Alexander v. United States*, 201 U. S. 117. And see *Cobbledick v. United States*, 309 U. S. 323; *Cogen v. United States*, 278 U. S. 221; *Pennsylvania Railroad v. Kirkpatrick*, 203 F. 2d 149 (3d Cir. 1953). Compare *DiBella v. United States*, 369 U. S. 121.

Petitioner G. E. has a complete remedy on appeal from judgment of contempt, if it chooses to disobey the district court's order (as in *Hickman v. Taylor*, 329 U. S. 495); or appeal from default judgment, or judgment after trial if the sanction imposed is an order striking its answers or precluding certain evidence.[2] Compare *United States v. Proctor & Gamble Co.*, 356 U. S. 677, where the United States suffered dismissal of its action in the district court, to obtain review of its refusal to comply with a discovery order.

In any event, the holding here, that no privilege protects the information sought, is eminently sound, and cer-

2. The order of the district court provides that default judgment shall be entered for non-compliance.

tainly involved no abuse of judicial power. *Bankers Life and Casualty Co. v. Holland*, 346 U. S. 379, 382. G. E. admitted it must supply and has been supplying information obtained by its attorneys (including petitioner Sawyer) from its present employees, and there is no logical basis of distinction with respect to information obtained in exactly the same way from employees who were subsequently disciplined and forced to resign because of their admissions and convictions. Their interests were in conflict with the interests of the company, whose policy they violated. Petitioner Sawyer was the attorney for G. E., not the employees. G. E. has control of all information he obtained. Indeed, on this very issue, petitioner Sawyer stated at a hearing before the district court on July 31, 1962: "Of course, if the general counsel of the company tells me, I work for the General Electric Company while I am doing this case. I am retained by them and the general counsel or the president says I want whatever you have got as a result of your interviews, of course he can get them." (Transcript of Hearing, July 31, 1962, pp. 32 to 33.) And as the district court said in its memorandum of February 16, 1962, referring to Mr. Wood: "The defendant (G. E.) admits that its vice president and general counsel had knowledge of the facts which impelled it to issue the statement and is able to answer the questions in full."

The district court found that the employees having knowledge of the facts were not in a policy making position with respect to the litigation facing the company. They were, in fact, in no different position from the crew members who were employees of the owners of the tugboat Taylor, whose statements to counsel for their employers, this Court held, did not involve the attorney-client privilege. *Hickman v. Taylor*, 329 U. S. 495.

Denial of the claim of privilege can also be fully justified on the ground that G. E. is only being asked to state the details of occurrences, which it has already admitted

generally in its proxy statement—namely violation of its policy and the antitrust laws by its employees, including those disciplined and discharged. The violations were again categorically admitted by Mr. Cordiner in his statement before the Kefauver Committee as follows:

> "There is no excuse in morality and ethics, in law or in the exercise of sound business judgment for these violations. . . . These violations were, of course, violations of law." Senate Hearings, *supra*, p. 17670.

Admission of the ultimate violations, based on information gathered from G. E.'s employees, may be deemed a waiver of any privilege as to the details. Compare *Rogers v. United States*, 340 U. S. 367.

The position which petitioners state they "consistently urged upon the district court", namely that with respect to the attorney-client privilege "any employee for whose conduct the corporation could be liable in connection with the facts disclosed stands in the shoes of the corporation when consulting the latter's attorney" (Petition, p. 11) is so extreme that it would insulate from disclosure, for example, the facts in an accident case reported by the negligent driver of a corporate vehicle to corporate counsel.

Reference to possible Fifth Amendment rights of the employees concerned is without substance, since G. E. and its attorney, Sawyer, have already disclosed in answers to interrogatories the names of all employees who violated the antitrust laws or company policy, and since the information being withheld is information for the most part obtained from former employees who were convicted and sentenced, or employees who received or waived immunity before the grand jury. Incidentally, in identifying the violations by G. E.'s present employees, petitioners expressed no Fifth Amendment qualms, though these are the employees who were not indicted. In any event, a corporation cannot rely on the Fifth Amendment privileges of its

employees' as a ground for withholding information. *Wilson v. United States*, 221 U. S. 361. And see *United States v. White*, 322 U. S. 694.

The work product principle of *Hickman v. Taylor*, 329 U. S. 495 was not even raised in the district court as a ground for refusal to answer plaintiffs' interrogatories, either in G. E.'s objections to the interrogatories or in its purported answers, or in hearings before the court. Indeed, petitioner Sawyer, expressing his objections to the district court, said:

> "I object to the thrust of the thing, but the one that I pick out particularly is because this paragraph has so clearly breached to me what seems to be a privilege that has never been doubted in the case, not the kind that was involved in Nate Richter's case,[3] not the Hickman situation, but the situation where managing agents of a corporation convey to counsel information in preparation of litigation, and you don't ask the agents or the corporation, you ask the counsel to furnish it. Now that, it seems to me, is privilege in its most pristine form." (Transcript of Hearing, July 31, 1962, p. 51.)

Of course, the interrogatories here have been served on G. E., not its counsel, and the order was entered against the corporation, not counsel. The first mention of the work product objection was in the petition for writs of mandamus and prohibition in the Court of Appeals.

In any event, the work product principle is not infringed, since the statements themselves or the lawyer's own notes have not been ordered produced. In *Hickman v. Taylor*, 329 U. S. 495, the Court emphasized that "A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney," p. 504. The Court ex-

3. The case referred to is *Maryland to Use of Peters v. Baltimore and Ohio R. R. Co.*, 7 F. R. D. 666 (E. D. Pa. 1947).

pressly approved searching interrogatories as a proper means of obtaining the facts from a party, as distinguished from the lawyer's notes, pointing out:

> "Interrogatories were directed toward all the events prior to [the] and subsequent to the sinking of the tug. Full and honest answers to such broad inquiries would necessarily have included all pertinent information gleaned by Fortenbaugh (the attorney) through his interviews with the witnesses. Petitioner makes no suggestion, and we cannot assume, that the tug owners or Fortenbaugh were incomplete or dishonest in the framing of their answers. . . . Denial of production of this nature (i.e., the lawyer's actual notes) does not mean that any material, non-privileged facts can be hidden from the petitioner in this case. He need not be unduly hindered in the preparation of his case, in the discovery of facts or in his anticipation of his opponents' position. Searching interrogatories directed to Fortenbaugh and the tug owners, production of written documents and statements upon a proper showing and direct interviews with the witnesses themselves all serve to reveal the facts in Fortenbaugh's possession to the fullest possible extent consistent with public policy." Pp. 508 to 509, 513.

In other words necessity has to be shown only for production of documents, a lawyer's actual notes, but no such showing need be made as a basis for interrogatories asking a party to state relevant facts in its possession, including facts which its employees knew and transmitted to its attorneys.

The fact that a great number of similar cases are pending throughout the United States does not justify granting review of this kind of interlocutory discovery order, and, on the contrary, militates against it. To grant review would only encourage defendants to delay the trials further, by deluging the Courts of Appeals and this Court

with applications for similar piecemeal appeals from all kinds of interlocutory orders entered every few days in one district or another, resulting in inordinate delay in bringing the cases to trial. As said in *Cobbledick v. United States*, 309 U. S. 323, 326:

> ". . . Neither a party nor a non-party witness will be allowed to take to the upper court a ruling where the result of review will be 'to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation. . . .'"

On the record in these cases petitioners have fallen far short of showing that the Court of Appeals should have granted them the extraordinary relief they sought, by issuing writs of mandamus and prohibition.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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